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ABSTRACT

This monograph provides school guidance counselors with practical and immediately adoptable techniques and procedures for dealing with the issue of student rights. Topics covered include a substantive overview of the dvelopment of student rights legislation, court decisions which have import for counselors, discussion of specific areas in which counselors should possess legal knowledge, and a need for counselors to become ombudspersons--aware of Federal and local regulation, responsible for communicating this knowledge to relevant school personnel, and striving to achieve justice for all concerned. When legal questions or doubts arise, this monograph can become a significant sourcebook. (Author/YRJ)

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STUDENT RIGHTS: RELEVANT ASPECTS FOR GUIDANCE COUNSELORS

by
A. William Larson

Edited and with an Introduction by
Garry R. Walz and Libby Benjamin

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PREFACE

The American School Counselor Association is pleased to have cooperated with the ERIC Counseling and Personnel Services Information Center to produce a series of monographs on subjects about which school counselors are expressing concern. Through regional meetings, groups of counselors identified topics they deemed to be of high priority, and five were selected for the monograph series. The series focuses on broadening the knowledge and enhancing skills of school counselors in a very practical sense.

I hope these monographs will assist counselors and counselor educators to meet the needs of students more effectively. After reading the monographs, counselors may wish to encourage ASCA to develop additional publications on other important topics.

I wish to express my thanks to the authors, Donald G. Hays, Helen F. Kristal, A. William Larson, Robert D. Myrick, and Daniel H. Nasman for the quality of their manuscripts. Also, my special appreciation to Garry R. Walz and to Libby Benjamin for initiating and sponsoring the project, and reviewing and editing all manuscripts.

It is my sincere hope that this series of monographs will be a valuable contribution to the work of school counselors, counselor educators, and other helping professionals.

Carol Reynolds
Interprofessional Relations Coordinator
American School Counselor Association

INTRODUCTION

New populations to serve, greater demands to demonstrate professional worth, thorny legal questions to resolve, and the need to acquire new skills are just some of the presses being experienced by members of the helping services. The demands for broadened services of counselors and other helping professionals have increased notably in recent years. The support for those services, however, has remained constant or diminished. Therefore, counselors are seeking more impactful strategies to deal with this paradox of more to do and less to do with.

While the need for new approaches and skills clearly exists, counselors are plagued by the double-headed problem of resources which are either difficult to obtain or too theoretical and abstract to be of practical utility. A high level discussion of child abuse has little to offer the hard-pressed counselor faced with helping a tormented child.

Our goal in creating this monograph series was to assist counselors to acquire practical and immediately adoptable techniques and procedures for dealing with current or emerging concerns. Initial discussions with the then ASCA president, Don Severson, and later with the ASCA Governing Board and Carol Reynolds, led to our identifying and prioritizing areas toward which we should focus our efforts. With help from ASCA, authors were selected who were highly knowledgeable about the functions of counselors in these chosen areas. Theirs was the task of culling from the large reservoir of accumulated knowledge and their own personal know-how those ideas and practices which would best serve pressed, if

not embattled, counselors.

It is our judgment that the process has been successful. Five monographs have been developed which deal with highly prioritized counselor needs and provide direct assistance to counselors. Singly or as a series, they can help counselors to heighten their awareness and upgrade their skills.

The titles of the five monographs in this series are: Needs Assessment: Who Needs It?, The Role of the School in Child Abuse and Neglect, Student Rights: Relevant Aspects for Guidance Counselors, Consultation as a Counselor Intervention, and Legal Concerns for Counselors. In all of the manuscripts the authors provide a brief overview of the historical background of the subject, speak to current trends and developments, offer a glimpse of directions for the future, and, most important, emphasize new roles for counselors and strategies counselors can use to be more effective in their work. Readers will also find extensive lists of helpful resources to which they can refer for more information.

The rewards for us in working on this project have been many. The support, interest, and cooperation of Don Severson, Carol Reynolds, and Norm Creange have been all that we could have asked for. The authors, while not always agreeing totally with our ideas, have been most responsive in incorporating our suggestions into the texts. Perhaps most of all, we feel rewarded by that certain look of discovery and pleasure evident in the faces of those who have reviewed the manuscripts. Like us, they experienced the joy of knowing that here at last was something

that could really make a difference in what they do. That pleases us immensely! Because making a difference is, after all, what we and ERIC/CAPS are all about.

G.R.W.
L.B.

ABOUT THIS MONOGRAPH

Gone are the days when teachers and administrators possessed unquestioned authority over students. Today the courts have broadly defined legal rights of students by their determination that students are citizens and therefore entitled to all of the rights and privileges granted under the Constitution to all citizens. Although the Supreme Court has ruled on a few significant cases involving student rights, it has remained for the States to interpret the law individually, with responsibility for specific regulations, in many cases, allocated to local school boards.

Dr. Larson is eminently qualified to speak to the issue of student rights because of his wide experience. In this monograph he provides a substantive overview of the development of student rights legislation, cites court decisions with import for counselors, discusses specific areas in which counselors should possess legal knowledge, and concludes with a plea that counselors become ombudspersons--aware of Federal and local regulations, responsible for communicating this knowledge to relevant school personnel, and striving always to achieve justice for all concerned.

For counselors who want to be truly helpful to others, familiarity with the issues discussed herein is vitally important and, we believe, a "must." When legal questions or doubts arise, this monograph can become a significant sourcebook and an invaluable addition to a counselor's professional library.

ABOUT THE AUTHOR

A. William Larson holds a B.A. degree from Dartmouth College and a J.D. from Syracuse University. In 1971-73 he was a Fellow in the National Program for Educational Leadership at The Ohio State University. Subsequent to this fellowship, Dr. Larson has taught law courses to graduate students in Education at three universities. He has also presented papers and conducted workshops on student rights for professional organizations, served as a consultant with state education departments, conducted inservice programs for various staffs, and worked extensively with students. A cooperating attorney on school matters with the New York Civil Liberties Union, he has also served as a school board member and university trustee. Dr. Larson is now working on the establishment of a Center for Ombudsmen in Education (COE) at Hofstra University where he presently is a member of the faculty.

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STUDENT RIGHTS: RELEVANT ASPECTS FOR GUIDANCE COUNSELORS

A. William Larson

"Students have all their rights, and it's about time that they recognized their responsibilities." So say some in education, but the matter of student rights just won't go away:

- There's something in my records that I would like to straighten out.
- This school discriminates against me just because I'm a female.
- I was only exercising my right to freedom of expression.
- My child must be allowed to take that course; she has the right to fail.
- It's not fair to be suspended without a chance to tell my side of the story.
- I don't see why I can't dress the way I want to.
- It may be legal, but it's still unjust.
- If you can't help my son, maybe a law suit will do some good.

A day in the life of a guidance counselor, laced with some of these concerns, may very well lead to his or her spending the evening hours in a law course. How else, it might be asked, can a counselor fully meet the needs of students within the context of a relationship built on confidence and trust?

It is the purpose of this paper to examine aspects of student rights that are relevant to the role of the guidance counselor in a public school system. The law is constantly evolving. Similarly, developing expectations of teachers and administrators, parents and

students are affecting the responsibilities of the counselor. At the same time, however, one can identify fundamental principles underlying the rights of students. An understanding of these principles is essential to effective counseling, no less than to anything else that takes place in public schools.

The Legal Framework of Student Rights

It may be said, in a sense, that there is really no such thing as "student rights." The term does not appear in the U.S. Constitution, including the Bill of Rights. Neither state constitutions nor state education statutes contain provisions spelling out the rights of students. State and Federal court decisions, on the other hand, do afford perspective in this regard. The language of Tinker[1] is instructive wherein the Supreme Court, declaring unconstitutional school policy banning the wearing of black armbands to symbolize opposition to the war in Vietnam, held that:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.
>
> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligation to the State.

There it is! The framers drafted constitutional protections that apply to students as well as to teachers and others (including

guidance counselors) in the school environment--and in the community at large. As "persons" under our Constitution, students are as fully entitled to constitutionally protected rights as are the rest of us. Citizens all, we share citizens' rights.

The basis for many substantive rights related to public school operations lies in the provisions of the First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitutionally protected procedural rights are grounded in the Fourteenth Amendment:[2]

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court, in 1975, forcefully underscored a student's right to due process of law in Goss:[3]

> Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that clause.
>
> At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.

Public school students, as Goss makes clear beyond any doubt, are not participating in their educational programs as a matter of privilege. Such students, to the contrary, are exercising a property interest, i.e., they have a legal right to an education in institutions created by the states for that purpose. In the context of the public school system, students are covered by constitutional protections, substantive and procedural, as much as other citizens in all walks of life.

When one is told that students have all of their rights, and ought to be impressed with their responsibilities, it is not inappropriate to recall that the Constitution's first ten amendments comprise the "Bill of Rights"--not a Bill of Rights and Responsibilities. Does it follow, therefore, that students can exercise constitutional rights, in school, without limitation? Not at all. As the Supreme Court said in Tinker, "they themselves must respect their obligation to the State." Inherent in the constitutional rights of students are two limitations that make up the "obligation" referred to in Tinker:

- A student, as in the case of any citizen, has no right to interfere with another person's exercise of constitutionally protected rights.
- A student does not have a constitutionally protected right to engage in conduct, as the Tinker decision put it, that "would materially and substantially interfere with the requirements of appropriate discipline in the operation of a school."

The counselor is concerned with the cognitive and affective development of the student-counselee as a human being. For many

students this concern finds adequate expression in competent advice regarding course selection and college admission. The counselor's responsibility to other students may involve the implications of maladjustment to the school environment. In every instance, however, sensitivity to legal rights, and knowledge-based responsiveness to perceived injustices, will make the counselor's work more fruitful and fulfilling.

Historical Development of Student Rights

The number of "school cases" reaching the Supreme Court of the United States has increased sharply in the past 35 years. Most of them have concerned church and state in education, desegregation, and academic freedom. In addition, it is in order to note Rodriguez,[4] dealing with school finance and equal educational opportunity, as well as several that bear on powers, duties, rights and responsibilities. The Supreme Court, in the Barnette[5] decision of 1943, struck down compulsory flag salute by students, stating that:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself, and all of its creatures--Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Thereafter, beginning with Tinker in 1969, the Court has effectively broadened the scope of recognized student rights at all levels of education. (At the same time judicial process has strengthened teacher rights, occasionally as a direct result of a decision resolving a controversy related to the rights of students, e.g., Barnette.) The impact of decisions, in both Federal and state courts, has required amendments to education laws and has prompted educators, at the state and district levels, to develop policy and procedures that reflect the emerging reality of student rights.

The counselor, together with others working in public education, is an employee of state government. As such, the counselor is legally obligated to observe the constitutionally protected rights of students. Beyond this, of course, the counselor should be familiar with the requirements of state education laws, statutory provisions which vary from state to state, as well as a number of statutes enacted by the Congress and related Federal government regulations. An understanding of some aspects of common law rounds out the necessary knowledge of a guidance counselor regarding the relationship of law to education in this Bi-Centennial Year of 1976.

The Range of Rights and Related Issues

It might appear at this point that the main thing for a counselor to remember is not to make a move before checking with the attorney retained by the school board. Advisable on rare occasions, as a

regular procedure this precautionary measure is often impracticable and quite unnecessary. It is essential, however, for the counselor to appreciate the range of student rights and have detailed knowledge with respect to some of them.

State education departments have issued publications that are convenient sources of useful information. In New York State, for example, Guidelines[6] covers various subjects, including "Availability of Student Records" and "Counseling." Both are of obvious interest to the counselor, the latter dealing with marriage, pregnancy and parenthood; other personal problems; and confidentiality of communication.

Not every legal issue is likely to confront the counselor on the job in the normal course of events. Administrators and/or teachers will ordinarily have direct responsibility for problems that involve the following issues related to student rights:

- speech, press, assembly and petition
- dress and grooming
- patriotic ceremonies
- distribution of literature
- grades and diplomas
- search and seizure
- speakers and programs
- corporal punishment
- curriculum
- religious freedom
- desegregation and integration
- adequacy of supervision
- suspension and expulsion

Ultimate responsibility, at the district level, necessarily comes to rest in the board of education. Long accustomed to "good faith"

immunity, school board members carry a new burden of care, individually, as a result of the 1975 Supreme Court decision in Wood.[7] The case involves a suit for damages against administrators and board members alleging a procedural due process violation when three 10th-grade girls were suspended for "spiking the punch" at an extra-curricular school function. By a 5-4 majority the Court held, on the issue of personal liability, as follows:

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under #1983[8] if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.
>
> A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

What is the significance of Wood regarding the personal liability of counselors and others employed by boards of education? A liability similar to that indicated for board members already may have been in existence. If there is any doubt about this, however, the holding in Wood sets the applicable standard for all who work in public education. It is advisable, therefore, to consider carefully those aspects of student rights that particularly concern the counselor.

Sex Discrimination

The most far reaching development with respect to sex discrimination in education results from Congressional enactment of Title IX of the Education Amendments of 1972. A model of brevity, Title IX simply provides that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Although legal control over education resides in the states, a power reserved under the Tenth Amendment to the U.S. Constitution, the influence of the Federal government is large and growing. The action of the Congress in passing Title IX is a case in point. It should be noted, however, that the statute itself merely begins to tell the story insofar as new legal requirements are concerned. Also necessary is an understanding of the implementing regulations promulgated by the responsible department or agency in the executive branch of the Federal government.

The U.S. Department of Health, Education and Welfare, Office for Civil Rights, issued the Final Regulation Implementing Education Amendments of 1972--Prohibiting Sex Discrimination in Education, effective the 21st of July, 1975. The act and regulation cover employment in education as well as the following points regarding students:

- access to all courses (including physical education)

- extra-curricular activities
- campus organizations receiving support from the institution receiving Federal funds
- access to competitive athletic programs, including special efforts to include women where their activities have been previously limited
- use, comparability and availability of facilities
- benefits supplied by the organization
- services supplied
- financial aid
- counseling
- health (may be separate but comparable)
- policies toward pregnant students
- social regulations
- fraternities and sororities

Excluded from coverage are textbooks or other curricular material, campus clubs not receiving support in any form from the institution receiving Federal funds and financial aid from a foreign will, trust, or other legal instrument under jurisdiction of a foreign government.[9]

Especially pertinent to counselors is the section on "Examples-Treatment" published by HEW:[10]

- A recipient school district may not require boys to take shop and girls to take home economics, exclude girls from shop and boys from home economics, or operate separate home economics or shop classes for boys and girls.

- A recipient vocational or other educational institution may not state in its catalog or elsewhere that a course is solely or primarily for persons of one sex.

- Male and female students shall not be discriminated against on the basis of sex in counseling. Generally, a counselor may not use different materials in testing or guidance based on the student's sex unless this is essential in eliminating bias and then, provided the materials cover the same occupations and interest areas. Also, if a school finds that a class contains a disproportionate number of students of one sex, it must be sure that this disproportion is not the

result of sex-biased counseling or materials.

- A recipient school district may not require segregation of boys into one health, physical education or other class, and segregation of girls into another such class.

- Where men are afforded opportunities for athletic scholarships, the final regulation requires that women also be afforded these opportunities.

- Locker rooms, showers, and other facilities provided for women must be comparable to those provided for men.

- Male and female students must be eligible for benefits, services and financial aid without discrimination on the basis of sex.

- An institution which has one swimming pool must provide for use by members of both sexes on a non-discriminatory basis.

The rules and regulations provide also for the designation of "at least one employee to coordinate (the district's) efforts to comply with and carry out its responsibilities...including any investigation of any complaint...alleging any actions which would be prohibited." It is also required that a district "shall adopt and publish grievance procedures providing for prompt and equitable resolution of student...complaints alleging any action which would be prohibited." Notification of policy, self-evaluation, and adjustment periods are also covered in the regulation.

It is reasonable to presume, of course, that students who feel discriminated against on the basis of sex will look to the "compliance person" for assistance. Is there nevertheless a role for the counselor in this regard? Certainly--to discuss with students the

implications of Title IX and the related regulation, to be concerned that the school district is taking timely steps to comply with the legal requirements in all respects, to follow up when a student feels that a complaint of sex discrimination has not been handled fairly. Familiarity with the subject of prohibited sex discrimination will be particularly helpful in working with female counselees.

HEW makes clear that the absence of regulations concerning curricular materials does not mean that they are unimportant from the standpoint of sex discrimination. As set forth in the statement of then Secretary Caspar W. Weinberger, "The...Regulation did not cover sex-stereotyping in textbooks and curricular materials (because this is) more properly dealt with at the State and local level."[11] At the local level, it would appear that the counselor is in a uniquely advantageous position to respond to this problem and initiate appropriate corrective action.

Student Records

The counselor has always had important responsibilities for some aspects of recordkeeping with respect to students in elementary and secondary schools. Although a state may have had regulations affecting student records, the Federal government is now, once again, the dominant factor in the picture. The Family Educational Rights and Privacy Act of 1974, (P.L. 93-380-Buckley Amendment), effective November 20, 1974, set the stage, and Implementing Regulations of the

Department of Health, Education and Welfare took effect on June 17, 1976.

Much has been written on the subject of student records under the Buckley Amendment. Prior to the regulations, it was clear that school districts receiving Federal funds faced new requirements regarding access to records, confidentiality and procedures for correction. The regulations, upon examination, reveal the following of particular interest to counselors:

- The rights accorded to and the consent required of the parent shall apply only to the student upon attainment of age 18. (#99.4)

- Each school district shall formulate and adopt a policy of (1) informing parents and eligible students of their rights under the regulations, (2) permitting parents or eligible students to inspect and review education records, and (3) not disclosing personally identifiable information from the education records of a student without the prior written consent of the parent or eligible student, except as otherwise permitted. (#99.5)

- Each school district shall give parents and eligible students annual notice of (1) their rights under the Act, the regulations and the policy adopted, (2) the right to file complaints concerning alleged failures by the school district to comply with the requirements of the Act and the regulations. (#99.6)

- An applicant for admission to an institution of post-secondary education may waive his or her right to inspect and review confidential letters and confidential statements of recommendation. (#99.7,c)

- Each school district shall permit the parent or eligible student to inspect and review the education records of the student. The district shall comply with a request within a reasonable time, but in no case more than 45 days after the request has been made. (#99.11,a)

- The right to inspect and review education records includes: (1) the right to a response from the school district to reasonable requests for explanations and interpretations of the records; and (2) the right to obtain copies of the records from the district where failure to provide the copies would effectively prevent a parent or eligible student from exercising the right to inspect and review the education records. (#99.11,b)

- A school district may presume that either parent of a student has authority to inspect and review the education records unless there has been provided evidence that there is a legally binding instrument, or a state law or court order governing such matters as divorce, separation or custody, which provides to the contrary. (#99.11,c)

- The parent or eligible student who believes that information contained in the education records is inaccurate or misleading or violates the privacy or other rights of the student may request that the school district amend them. (#99.20,a)

- The school district shall decide whether to amend the education records in accordance with the request within a reasonable time of the receipt of the request. (#99.20,b)

- If the school district decides to refuse to amend, it shall so inform the parent or eligible student and advise of the right to a hearing. (#99.20,c)

The regulations then set forth (#99.21 and 22) particulars about the right to a hearing and the conduct of the hearing. Fundamentally fair proceedings are intended in keeping with the requirements of due process of law under the Fourteenth Amendment of the U.S. Constitution. It is important to note a point that arises if the hearing results in determination that the challenged information is <u>not</u> inaccurate, misleading, or otherwise in violation of the privacy or other rights of a student. In this event, the school district must "inform the parent or eligible student of the right to place in the education records of

the student a statement commenting upon the information in the education records and/or setting forth any reasons for disagreeing with the decision of the agency or institution."

Counselors will want to be fully familiar with the provisions of the regulations governing disclosure (#99.30-37). As previously indicated, the written consent of the parent or eligible student is normally required prior to the disclosure of personally identifiable information from the education records of a student. This consent must be signed and dated by the parent or eligible student, and the consent should cover the records to be disclosed, the purpose or purposes of the disclosure, and the party or class of parties to whom the disclosure may be made. Upon disclosure the school district shall, if requested, provide a copy of the record involved to the parent or the eligible student, as well as to any other student when requested by the parents.

Prior consent for disclosure is not required in a number of situations specified in the regulations. These include school personnel with "legitimate educational interests," officials of another school or school system where the student wants to enroll, and certain Federal and state officials for Federal program purposes. Other exceptions are indicated in the regulations, and applicable conditions are also set forth.

Pending clarification of legal rights and responsibilities with respect to "education records," counselors among others have understandably been cautious about writing down information for the files of a student. Self-interest deters one from taking action that may prove to

be personally detrimental. Carried to extreme, this posture results in the development of only innocuous data and the loss of any useful continuity in terms of the education records of a student.

The implications of the Buckley Amendment, and related regulations, remain to be determined fully from ensuing decisions of courts, state boards of education and chief state school officers. At this time, however, there is no lack of specificity regarding parent/student rights and education records. The task of the counselor, therefore, is to understand the provisions of the statute and regulations in order to proceed confidently in terms of what must be done, what can be done, what cannot be done.

To begin with, the counselor should study the requirements and keep a copy of the regulations readily available for reference during conferences with students and/or parents. In addition, the school district should schedule inservice workshops to assure a commonly shared understanding of proper procedures regarding education records. This will obviate problems otherwise likely to occur as a result of different interpretations among counselors and other school personnel. At a minimum, counselors can hold their own workshops to make certain that uniform procedures are followed in their department in the handling of education records, including access, correction and confidentiality.

Privacy

A citizen's right to privacy, although not spelled out in the

Constitution, is nonetheless firmly grounded there. Related to the Fourteenth Amendment by some decisions, one's right to be let alone has been linked on other occasions to the Ninth:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The matter of privacy, of course, is very much involved in provisions of the Buckley Amendment concerning education records. Privacy is also at the heart of the Danforth decision[12] handed down by the Supreme Court on July 1, 1976. At issue in the case was the constitutionality of Missouri's statutory requirements with respect to abortion: (1) prior written consent of the patient for abortion to be effected after 12 weeks from the inception of pregnancy; (2) prior written consent of the spouse, if any; and (3) prior written consent of the parent of a person under the age of 18. Arguments against the statute noted that no similar requirements exist in Missouri with respect to medical and/or surgical treatment for venereal disease, drug abuse or pregnancy, nor is parental consent necessary in order for one under 18 years of age to be married. The State, on the other hand, contended that its legitimate interests were served by the action of the legislature in assuring the welfare of minors, not unlike restrictions related to weapons, literature, alcoholic beverages and tobacco.

Upholding only the first part of the statute, the Supreme Court invalidated the balance as an unconstitutional invasion of privacy. Referring to Roe v. Wade,[13] which turned on the viability of the fetus, the Court said:

> Constitutional rights do not mature and come into being magically only when one attains the state defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

Regarding the blanket requirement of parental consent to the abortion of a daughter under 18, the Court found no justification related to significant State interests, whether to safeguard the family unit and parental authority or otherwise, in conditioning abortion on the consent of the parent with respect to an under-18-year-old pregnant woman. As far as the husband is concerned, the State cannot delegate to a spouse veto power which the State itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy. There is no constitutional authority, the Court made clear, for the State to give a third party absolute, and possibly arbitrary, veto over the decision of physician and patient to terminate the patient's pregnancy, regardless of the reason for withholding consent. The abortion decision and its effectuation, according to the opinion of the Court, must be left to the medical judgment of the pregnant woman's attending physician.

Lest one tend to draw overly broad conclusions from this case, the Court cautioned it was not suggesting that every minor, regardless of age or maturity, may give effective consent for the termination of pregnancy. Rather, the factual situation under review on this occasion simply did not justify the statutory provision for special consent by other than the woman's physician.

Many high school counselors may have reason to welcome the

Danforth[12] decision for clearing the air about a vexing problem: Teenage pregnancy and intended abortion have long since ceased to be a rarity on the counselor's agenda. But to what extent the air is fully cleared, politically as well as legally, still remains to be seen. Students understandably want to regard their communications with counselors, particularly those involving private life, as personal and confidential. Such communications, however, do not enjoy the same protection in this regard that the law affords--for example, to lawyer-client, or doctor-patient.

The foregoing demonstrates that the law, constantly evolving,[14] seldom comes to grips with a problem and lays it to rest in all respects, not even when the Supreme Court of the United States renders a decision on a case. Problems in public education are often complex and many-faceted, overlaying educational issues with legal and political considerations; and by no means do all problems lend themselves to determination by society's agency for the resolution of controversies--the courts. It is the state legislature, responding to political action, that could extend the protection of privileged communications to the counselor-counselee relationship. And it is the local board of education, again in the context of the political process, educationally oriented to be sure, that must decide upon appropriate procedures within the schools and between the school and parents. Beyond the scope of constitutional protections, therefore, new policy provisions affecting public education depend on political action addressed to legislative bodies at all levels of government: Congress, state legislatures and

local school boards.

New York State's Guidelines[15] cover the matter of confidentiality in these terms:

> The law has traditionally recognized that the nature of certain relationships (e.g., physician/patient, lawyer/client) encourages a person to disclose information about himself and his affairs. He might not have revealed the information if the relationship had not included the understanding that such information could not lawfully be repeated. These statutory privileges are for the benefit of the patient and client, rather than the practitioner and, consequently, may be waived. As a general rule, information received by teachers and other school officials is not privileged and may be revealed by the recipient of such knowledge whenever he feels that it is appropriate to do so. Not all communications with persons capable of entering into privileged relationships (e.g., attorneys, doctors, dentists, licensed practical and registered professional nurses, clergymen, certified social workers, and registered psychologists) will be privileged per se; technical rules of evidence will be used to determine when a confidential relationship exists.

Concerning marriage, pregnancy and parenthood, the same publication includes this advice:

> The opportunity to participate in all the activities of the school must not be restricted or denied solely because of marriage, pregnancy, or parenthood. If a student so desires, she may return to the school she previously attended after the birth of her child.
>
> Students should have access to counselors who are qualified to provide objective information to students concerning pregnancy and marriage, and schools should make every effort to provide programs and services appropriate to the special needs of pregnant women.

There have been many decisions, in Federal and state courts, that provide for equal educational opportunity stemming from the equal protection clause of the Fourteenth Amendment, without limitation due to the status of a student in regard to marriage, pregnancy and parent-

hood. As matters related to private life, such conditions cannot constitutionally form the basis of a limitation on the student's legal right to a public education as a property interest created by action of the state.

Placement

The term "placement," broadly construed, covers a host of counseling concerns, including testing and grouping, special education, and course selection in general. Whatever a counselor may be doing in regard to placement, it is quite likely that the matter under consideration will have constitutional ramifications touching on the due process and/or equal protection clauses of the Fourteenth Amendment. Consequently, it is advisable to take a close look at developments which should raise the consciousness of the counselor about the relationship of law to education in these areas of professional activity.

The mere mention of standardized testing and ability grouping may start a spirited debate among educators and others concerned with public education. Within the profession, the National Education Association and the American Federation of Teachers are to be found on opposite sides of the fence regarding the educational value of standardized tests. The latter "has supported the continued use of standardized tests, while at the same time recognizing the need to correct their shortcomings and eliminate their abuse. In contrast, the NEA and several other groups have called for a moratorium on all standardized

testing."[16] The AFT takes the position that although some aspects of education are impossible to measure, standardized tests currently offer the only means of measuring overall performance in basic skills within and among schools. Moreover, according to this union, an AFT survey of elementary and secondary school teachers shows that a majority (of the sampling) believe these tests, when used appropriately, are a "valuable resource in diagnosis of learning problems and in curriculum and instructions planning." A qualification follows:

> This is not to say, however, that modifications in testing procedures are not needed. Test publishers must take greater responsibility for assuring the validity and reliability of their tests and in informing test users of the specific purposes of individual tests. Educators and the public must assume their share of the responsibility for proper utilization and interpretation of various tests. No less important is the need for the public to be better informed on the meaning of test results.

Some of the "other groups" (apart from the NEA) speaking to this matter display great hostility toward standardized testing and the ability grouping that results from the testing procedures. One of these groups is the Institute for Responsive Education which devoted an issue of its publication, Citizen Action in Education, to the subject of testing. IRE Director Davies, in the lead editorial, declares, "It's not surprising that the controversy about standardized testing is heating up. Testing is big business--schools alone spend more than $24 million a year to test children. Test results have a big impact on people's lives and on public policy. They affect children, parents, teachers, school programs, and how children feel about themselves as well as how taxpayers feel about schools. They are used to label, sort, divide

reward and punish, and decide what is taught." Exhorting constructive action in the field, so to speak, Davies contends that:

> Local groups need to become informed about testing issues and practices in their communities and join educators to push for new policies, better guidelines and controls, protection against racial and cultural bias in tests, misuse of test scores, better tests where tests are needed, and alternative ways to make judgments about learning and teaching. Decisions on this issue are too important to be made by educators alone, by test specialists, or by school boards and legislators responding to political pressure from one group or another.[17a]

Elsewhere in the journal[17b] the reader learns the results of a conference called "to explore the educational, social, and legal implications of the widespread use of standardized achievement tests throughout the country." The conference, sponsored by the National Association of Elementary Principals and the North Dakota Study Group on Evaluation, resulted in a statement that includes nine recommendations with respect to the content, design, and use of standardized tests.

Some have found within the context of standardized testing, and related procedures, invidious discrimination resulting in desegregation within the school. Hall, for one, calls attention to "the student push-out" and sounds this alarm:

> The (false) issue of busing ("It's not the buses...it's the Niggers"), the misuse of testing, ability grouping, private segregated academies, etc., all represent forms of the continuing resistance to desegregation. America is persistently unwilling to afford all children an equal education as it persistently fails to provide equal opportunity to all citizens. This poses a real possibility of hollowing out a long-fought-for victory by advocates of equality in education.[18]

The legal aspects of testing and grouping are complex, to say the least, as evident from the variety of scholarly opinions to be found in

professional journals as well as through a review of judicial decisions. The issue of equal protection is certainly the nexus between education and the law with respect to these public school practices, and Hobson[19] is a precedent for the finding that a tracking system violates the Federal Constitution because the labeling of students (in the District of Columbia) amounted to *de facto* racial and economic classifications:

> When standard aptitude tests are given to low income Negro children or disadvantaged children, however, the tests are less precise and less accurate--so much so that test scores become practically meaningless. Because of the impoverished circumstances that characterize the disadvantaged child, it is virtually impossible to tell whether the test score reflects lack of ability--or simply lack of opportunity.
>
> ...the track system must be abolished. In practice, if not in concept, it discriminates against the disadvantaged child, particularly the Negro (and any) system of ability grouping which...fails in fact to bring the great majority of children into the mainstream of public education denies the children excluded equal educational opportunity and thus encounters the constitutional bar.

It should be quite clear, of course, that Hobson does not mean that all tracking is bound to fall in the face of a legal challenge. But there is a message, for counselors and others concerned, that cannot be ignored with impunity: every aspect of school policy and procedures related to testing and grouping should be carefully considered from the standpoint of the Fourteenth Amendment's requirement of equal protection of the laws. Evaluation is called for to determine, as objectively as possible, if equal educational opportunity is enhanced by testing and grouping.

Some educators may claim to have been making this kind of evaluation at all times in the past. Francis, writing in the NOLPE School Law

Journal, expresses doubt that appears to be widely shared:

> Most schools and colleges rely on standardized tests developed and marketed by educational testing agencies and businesses. Rarely do these testing devices measure job performance, practical experience, creativity, critical thinking, applied skills, or the ability to solve problems. In addition, the language abilities that traditional testing procedures measure are largely far from neutral. Until recently most testing devices have been shot through with economic, political and cultural biases.[20]

As in the case of other elements of public schools operations (e.g., funding), a gap between promise and performance has been filled from the judicial bench. In Griggs,[21] decided in 1971, the Supreme Courts, as Francis notes, "took educational research work on the discriminatory and dysfunctional effects of traditional testing and evaluation procedures seriously and applied it to employment practices." Although Griggs involved the employment hiring and transfer criteria of the Duke Power Company, found to be illegal, the decision is regarded by some, including Francis, as having a potentially great impact on public education at all levels. As she puts it:

> Griggs might be a step toward freeing institutions of learning from the discriminatory and dysfunctional schooling and testing purposes and setting them on the path to a more truly educative mission.
>
> If nothing else, Griggs v. Duke Power Company should provoke educators into rethinking the nature of schools and testing procedures. Educators are long overdue in creating more humane and viable alternatives for educating and evaluating learners and instructors.

The business of courts is the law, not the educational wisdom of any policy or practice. Educators differ about and debate the merits of testing and grouping, but the outcome of litigation should not depend

on the weight of professional opinion one way or another. Even if a majority of educators favor the homogenized grouping that results from a system of tracks, the court's concerns may nevertheless present a legal roadblock.

Classification has been referred to as the jugular vein of the Fourteenth Amendment's equal protection clause. Although classification is not per se condemnable, constitutional interpretation imposes the requirement of similar treatment for like objects. Since Brown[22] in 1954, classification on the basis of race is unconstitutional. And, as Dimond asserts,

> Whenever classification has the effect of systematically and disproportionately singling out a minority group of a particular race or national origin for exclusion, placement in special education class or the bottom tracks, it may be a suspect classification.[23]

By extension the legal issues involved in testing and grouping also require consideration with respect to any placements in programs of special education. Legal control over public education, as previously noted, resides in the states as a power reserved under the Tenth Amendment. Most of the states mandate constitutionally that their legislatures shall provide for a public school system wherein all of the children of the state may be educated (the other states assuming substantially the same position legislatively). These are the circumstances giving rise to the individual's property interest (i.e., legal right) in an education in institutions provided by the state for that purpose.

It is significant that the constitutional and statutory provisions set forth no exceptions in this regard; the call is clearly for the

education of all children. The right to an education established by the states lays the foundation for court decisions affecting the handicapped. In Mills[24] a District of Columbia Federal court had to deal with this matter in the case of children who were brain damaged, hyperactive, epileptic and mentally retarded. At issue were allegations that the District Board of Education failed to provide the children with a publicly supported education and the complaint that procedures employed by the schools in excluding the children violated due process requirements. In a decision for the parents and guardians, the court held:

> The defendants are required...to provide a publicly-supported education for these "exceptional" children. Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education, and their failure to afford them due process hearings and periodical review, cannot be excused by the claim that there are insufficient funds...
>
> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly-supported education consistent with his needs and ability to benefit therefrom.

This concept had been articulated in the decision of a Federal court in PARC.[25] Here the Pennsylvania Association for Retarded Children brought suit on the ground that the State had failed to provide all retarded children access to a free public education. The suit was resolved with a decision that required placement of all retarded children in programs, and due process rights were firmly established for children who are or are thought to be mentally retarded. The Court's decree, as reported by the Council for Exceptional Children,[26] provided

that no such child can be denied admission to a public school program or have his educational status changed without first being accorded notice and the opportunity for a due process hearing.

Legislative reinforcement of the rights of the handicapped has developed at the state level in some states as well as at the level of the Federal government. Now on the books is the Education for All Handicapped Children Act of 1975, discussed in a report published by the National Information Center for the Handicapped.[27] The purpose of this statute is:

> To assure that all handicapped children have available to them...a free and appropriate education which emphasizes special education and related services designed to meet their unique needs.

Due process of law also received attention in the Act. As a matter of right, parents are entitled to be fully informed of and participate in the planning for the child's education. This means notice in writing before any action is taken, access to records, procedure for complaints, an impartial due process hearing, and adequate appeals procedures.

Counselors should be aware that the Act also brings the matter of mainstreaming into sharp focus. Eligibility for Federal funding under the Act is related to state

> procedures to assure that, to the maximum extent appropriate, handicapped children...are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

The question, of course, is what kind of program is most suitable to meet the educational needs of each individual child. And when mainstreaming is indicated, as Rauth suggests, "Counselors, psychologists, psychiatrists, and other auxiliary personnel must be readily available to special and regular teachers if mainstreaming is to be successful."[28]

The full dimensions of placement in public education also invite attention to the question of bilingual education, another instance where the same legal issue comes to the fore. The U.S. Commission on Civil Rights makes the point clear in this statement:

> A public school system discriminates against non-English-speaking children in violation of their right to equal protection of the laws under the 14th Amendment of the U.S. Constitution when it fails to educate them in a language they can understand.[29]

A fairly steady flow of decision, buttressed by state and Federal legislation, underscores the importance of sensitivity to the concepts of equal protection and due process in all aspects of placement. And it would appear that no one in public education has a greater need for understanding in this regard than the men and women who serve as counselors to all children attending schools.

The Counselor and Ombudsmanship*

Among the many facets to the role of counselor, none is more important than services rendered directly to the student; the counselor-

* In this section the term "ombudsman" is used throughout for ease in writing. However, the term is construed to mean "ombudsperson" and in no way is meant to exclude women from this function.

counselee relationship is critical. An appreciation of the legal rights of students, coupled with solidly-grounded knowledge pertaining thereto, is imperative in order for the counselor to be fully effective in this relationship. But the law, it should be clear from the preceding discussion, is in no sense the be-all and end-all with respect to the counselor's concern for students. This concern properly embraces total development, and it is incumbent upon the counselor determined to do a first-rate job that he/she recognize students' concerns arising from perceived injustice when there is not necessarily any violation of legal rights. This fact of educational life emphasizes the need for established grievance procedures at the district level.

The felt need to undertake litigation may be regarded, in a sense, as evidence of institutional failure to provide adequately for redress in the context of law and justice. These terms, "law" and "justice," are not synonymous, and the school district should face up to distinct responsibilities with respect to each of them. Regarding the law, programs designed to further the understanding of staff and students and parents are very much in order. Striving for justice, on the other hand, militates in favor of having an education ombudsman properly designated, structured and funded.

Originating in a Swedish constitutional provision adopted in 1809, the concept of the ombudsman, variously titled, has spread to many other countries. In the United States the most notable development is to be seen among institutions of higher education. Based on the Swedish model, the functions of the ombudsman were elsewhere described by this writer:

> To begin with, the ombudsman serves as a useful source of information by referring citizens to proper parties for the necessary attention to particular problems. Similarly, the ombudsman ascertains that a complainant has exhausted available administrative channels before he will consider a complaint.
>
> There are occasions when the ombudsman can tell from the nature of the complaint and/or the complainant that no affirmative action is indicated. The complaint, for example, may be identical with one previously investigated and found to have been unjustified. In this event the ombudsman is expected to provide a clear and courteous explanation to the complainant of the reasons for rejecting the complaint without undertaking an investigation of facts.
>
> With respect to all other complaints the ombudsman does make an investigation of relevant facts. As a first step he requests an explanation from the administrator or administrators involved. If that is insufficient, the ombudsman can examine pertinent records and interview witnesses as necessary to ascertain the facts and form a judgment on the merits of the complaint.
>
> When investigation discloses that a complaint is not justified, the ombudsman advises the complainant accordingly. Upon finding that a complaint is justified, the ombudsman recommends to the agency concerned appropriate action to rectify the injustice and, if possible, to prevent a recurrence. The recommendation may range from a simple apology to a reversal of decision.[30]

It hardly seems necessary to note an undeniable need for procedures by which students, and their parents when appropriate, can obtain satisfactory action on complaints of injustice. The education bureaucracy, no less than many others it would appear, is inherently bound to cause some of those it seeks to serve to suffer unjust treatment. Complaints may include charges of rudeness, delay, misinformation, oppression, manipulation, discrimination, incompetence, inefficiency, unfairness, or abuse of authority in the course of bureaucratic functioning.

The work of the ombudsman involves investigation and recommendation of appropriate action on any complaint of injustice arising out of the operations of the school district. No one is required to use the services of the ombudsman, but he must be accessible to those who wish to avail themselves of his good offices. And it is equally important that the ombudsman be perceived as invulnerable to influence and pressure from those employed in the school system he serves on behalf of students and parents. If the ombudsman is apparently afraid to bite the hand that feeds him, his credibility will be shattered.

After an education ombudsman has handled complaints for some time, another function will begin to take shape: the ombudsman will be able to target problem areas as patterns of complaints emerge. At this point the ombudsman will try to identify the cause or causes of related complaints and suggest corrective action to clear up the situation. Suggestions might include closer supervision, strengthening of staff, improved communication--or some other change in policy, procedures or personnel.

The ombudsman has no authority to issue an order for anyone to take any specific remedial action. His clout is derived from the reputation he brings to the job as well as the ground rules established to provide for his functioning. The very existence of an ombudsman has a salutary effect in that the system he is empowered to investigate will become more responsive to its constituents. At the same time, the ombudsman provides a buffer between the staff and complainants; he draws away from professionals and others on the staff many complaints that otherwise

might cause immeasurable irritation. (Past practice indicates that most complaints are found to lack merit because no injustice was found to have occurred.)

This brief description of the ombudsman's role provides the background to deal with a contemporary reality. School boards and administrators are inclined to let sleeping dogs lie, and the prevailing quietude among school districts provides little incentive to move ahead with ombudsmanship. This is unfortunate because there is an unusual opportunity at the present time to go about the business of meeting needs, as heretofore set forth, with thoughtful deliberation. The turmoil and disruption of yesteryear spawned a proliferation of ombudsmen, but now the average student is turned off and tuned out. Many counselors, among others, may lament the apathy and passivity of students, but the powers-that-be are apparently reluctant to seize the day for constructive action and thereby head off another period of student unrest at some point in the future. (Ironically, even teachers often share this reticence, although most of them have long since achieved grievance procedures through collective bargaining.)

Absent a designated ombudsman, what recourse is available to counselors disposed to favor the concept of an advocate to deal with the complaints of students? First, of course, is initiative intended to secure the establishment of an ombudsman's office. Alternatively, the counselor may undertake to fill the void by performing functions that would preferably be assumed by a designated ombudsman. Just as programs covered by Federal and state legislation are now frequently

found to provide for due process hearings, counselors can properly concern themselves with fair proceedings in regard to the complaints and grievances that come to them from students or parents. It isn't useful to suggest that a distinction be drawn between, say, a complaint of injustice or a grievance alleging violation of legal rights. In a consulting capacity with the student, the concerned counselor will want to offer a helping hand in either case. How should it be done?

With few exceptions, the school district now provides only a system of bureaucratic review when a student feels offended by some action to which the student was exposed. The available recourse is the chain of command, an often frustrating journey step-by-step through the administrative hierarchy to the school board. Depending on the issue, assistance may be requested from the outside; the American Civil Liberties Union, for example, will not infrequently provide the services, without cost, of a cooperating attorney. (It is prerequisite that a civil liberties issue, e.g., freedom of expression, is involved.) But many is the time that a student and/or parent has to go it alone in the face of formidable obstacles, real and imagined. Armed with meager knowledge about legal rights, the complainant feels that the appeal is being considered by individuals with interests vested in preserving the status quo. The rejection of the appeal, although justifiable, is nevertheless viewed with great skepticism. How much better the attitude if an ombudsman, respected for impartiality, objectivity, and competence, is the bearer of bad news. So, too, can the counselor, operating from a relationship of confidence and trust, help to preserve a healthy climate in school

even when the student's complaint or grievance merits no remedial action.

Koltveit shares the view that the counselor can move constructively into the area of ombudsmanship:

> Ideally, each school shall have an ombudsman; but since this is not the case, nor is it likely to be in the near future, counselors can perform some of the ombudsman's functions without doing violence to their more traditional role.[31]

What are the functions counselors can consider undertaking? The following suggestions may constitute useful guidelines in this respect:

1. Listen to complaints.
2. Determine on the face of a complaint if it may have merit involving either a violation of student/parent rights or the occurrence of injustice.
3. If not, provide a clear explanation to that effect.
4. If so, offer to be of assistance by:
   a. checking resources in the literature of the counselor's professional library;
   b. referring the complainant to the appropriate party for possible resolution of the complaint through established channels if a question of legal rights is involved;
   c. intervening on behalf of the student when the complaint alleges unjust treatment by someone in the employ of the school district;
   d. attempting to effect a reconciliation, with appropriate corrective action, when investigation discloses that injustice has occurred.
5. Call attention to other sources of possible assistance that might be helpful to the complaining party.

It is folly to think that a counselor, or a department of them, can set sail under the canvas of these guidelines without prior arrangements. But there is nothing that stands in the way of counselors

proposing discussions among teachers, administrators and support staff, as well as students and parents, that seek the development of ombudsmanship in the building and in the district as a whole. There is much to recommend that the counselor's functions should include efforts to resolve complaints, and one would hope that others concerned will reach this conclusion. On one hand, students and parents will have to feel a need that can be filled by counselors dealing with complaints. On the other hand, it is also essential that colleagues, far from feeling threatened, recognize the value of such an added role for the counselor.

There may be a legacy of doubt to overcome before the counselor can enter this arena of internal communication successfully. Marker and Mehlinger[32] put it harshly in these terms:

> The typical high school employs people who listen to but do not act upon the grievances of students. There is no ombudsman to intervene on behalf of the students with the bureaucracy. Counselors are really tools for administrators, despite the professional ideology of counseling. Who can a student complain to if his teacher is incompetent, is lazy, is a racist? A student must either accommodate himself to the situation or rebel--silently, by dropping out of school or by turning in poor work, or overtly, by setting fire to trash cans or triggering fire alarms.

Discounting the conclusion of Marker and Mehlinger, it is still abundantly clear that counselors can reach out to significant new horizons in their professional careers by taking action to provide for ombudsmanship in the public schools.

A Look Ahead

Under the mantle of *in loco parentis* teachers and administrators

traditionally enjoyed unquestioned authority over the lives of school children. So it was until the middle of the tumultuous 1960's when, in the wake of student unrest on college and university campuses, turmoil and turbulence spilled over to school districts throughout the country. No longer were home and church and school accepted by young people as sources of ultimate authority; everything was suddenly opened to challenge.

Judicially, 1943 saw Jehovah's Witnesses striking a blow for student rights in Barnette.[33] After that, however, accustomed normalcy prevailed until 1969 when black armbands invoked the attention of the Supreme Court in Tinker.[34] This case proved to be the opening chapter in a saga of expanding student rights as a result of court decisions. (In 1954, of course, the Supreme Court had struck down *de jure* segregation in Brown.)[35] Almost too fast to absorb, schools were confronted with court-ordered changes regarding student dress and grooming, freedom of expression (speech and press) under the First Amendment, equality of course offerings to boys and girls, and other substantive rights as well as procedural due process in disciplinary action affecting students. From Tinker to Wood,[36] in 1975, the flow of decisions was like the rush of water when the dam has burst.

What now? More of the same? Or, if not, what does appear to lie ahead? Up to this point, it is fair to say, the courts have staked out the legal principles underpinning the rights of students in schools pursuant to constitutional provisions. It is not unlikely that there will be a marked slackening of judicial decisions affecting student

rights, but there are several areas in public education where further clarification of the law is indicated. Fischer and Schimmel,[37] for example, pointed in 1975 to such "Frontier Issues" as:

> Testing and the Right to Privacy--Psychological tests are likely to be carefully scrutinized in the years to come, and it is probable that only those that are clear and specific will be allowed; even then, informed consent by parents and students will generally be required.
>
> Grouping and Tracking--...it is probable that the procedure will come under increasing legal attacks during the next decade. Grouping is widespread, yet the tests used to place students into groups are so inadequate that they are vulnerable to claims that they violate the due process and equal protection clauses of the Fourteenth Amendment.
>
> Economic Inequality--Since most state constitutions contain an equal protection clause or provide for a "thorough and efficient" or "uniform" system of schooling, it is likely that legal attacks on inequalities in school finance will rely on these provisions.
>
> School Accountability--The next decade may develop alternative ways of holding schools accountable to students, parents, and taxpayers, but it seems doubtful that courts will require schools to pay damages to students who did not succeed in their programs.
>
> The Right Not To Go To School--Although the Supreme Court limited its ruling in the Yoder case[36] to members of established religious communities, this decision, which allowed one minority group to escape the compulsory attendance laws, can be expected to encourage others to seek similar rulings in the coming years.

There is no reason to quarrel with the predictions of Fischer and Schimmel, but it would appear that the focus of further developments bearing on student rights will shift from litigation to political action. The courts have done their job, one might say, in establishing that students are persons under the Constitution and entitled to its protections to the same extent as any other citizens. Important to recall is the fact that

the Bill of Rights and other amendments to the U.S. Constitution were adopted not for students or teachers or administrators or school boards or parents, but for citizens. It is for citizens, therefore, whatever their status may be otherwise, to work for the development of policy, procedures and programs that are responsive to and consistent with the legal principles articulated by the courts.

Counselors have a rare opportunity to provide essential leadership in mapping the route to further progress in the years ahead. And this requires that they concern themselves with both the legal rights of students and the means to assure simple justice in the operations of public schools.

FOOTNOTES

1 Tinker v. Des Moines Independent School District. 393 U.S. 503 (1969)

2 The Fourteenth Amendment has been construed by the Supreme Court so as to cause the First Amendment, and others, to apply to states as well as to the Federal government.

3 Goss v. Lopez. 419 U.S. 565 (1975)

4 San Antonio Independent School Dist. v. Rodriguez. 411 U.S. 1 (1973)

5 West Virginia State Bd. of Educ. v. Barnette. 319 U.S. 624 (1943)

6 The State Education Department, The University of the State of New York. Guidelines for student rights and responsibilities. Albany, N.Y.: Author, 1975.

7 Wood v. Strickland. 420 U.S. 308 (1975)

8 The Civil Rights Act of 1871, 42 U.S.C. 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

9 National Institute of Education. Title IX Regulations. Human Rights, June 1974.

10 U.S. Department of Health, Education, and Welfare. Title IX--Civil Rights. HEW Fact Sheet, June 1975.

11 U.S. Department of Health, Education, and Welfare. Statement by Caspar W. Weinberger, Secretary of Health, Education, and Welfare. HEW News, June 3, 1975.

12 Planned Parenthood of Central Mo., et al. v. John C. Danforth, Attorney-General, State of Mo. 44 L.W. 5179 (1976)

13 Roe v. Wade. 410 U.S. 113 (1973)

14 The late Benjamin Cardozo, then a Justice of the Supreme Court, said: "The Law never is--it is always about to be."

15 The State Education Department, op. cit., p. 24.

16 American Federation of Teachers/AFL-CIO. The AFT Task Force on Educational Issues. American Teacher, 61/1, September 1976.

17a Davies, D. Harnessing the testing machine. Citizen action in education. Institute for Responsive Education, 3/3, March 1976.

17b Educators probe the use of tests. op. cit., p. 11.

18 Hall, L. School desegregation: A (hollow?) victory. Inequality in Education. Cambridge: Harvard University, Center for Law and Education, No. 17, June 1974.

19 Hobson v. Hansen. 269 F. Supp. 401 (1967)

20 Francis, A.M. Schooling, testing, and jobs: A re-examination of Griggs, et al. v. Duke Power Company. NOLPE School Law Journal, 5/1, 1975.

21 Griggs, et al. v. Duke Power Company. 401 U.S. 424 (1971)

22 Brown v. Board of Education of Topeka. 347 U.S. 483 (1954)

23 Dimond, P.R. Classification practices: A lawyer's guide to schools. Classification Materials. Cambridge: Harvard University, Center for Law and Education, March 1972.

24 Mills v. Board of Education of District of Columbia. 348 F.Supp. 866 (1972)

25 Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania. 334 F.Supp. 1257 (1972)

26 Abeson, A., & Bolick, N., Eds. A continuing summary of pending and completed litigation regarding the education of handicapped children. Reston, Va.: Council for Exceptional Children, No. 8, December 31, 1974.

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